

11 U.S.C. § 330  
11 U.S.C. § 545  
ORS 87.430  
attorney fees  
retaining lien

United States Trustee v. Garvey, Schubert, BAP No. OR-96-2118-HNJ  
In re Century Cleaning Services, Inc., Case No. 395-36126-elp7

10/17/97

BAP aff'g ELP

Published  
215 BR 18

The BAP affirmed Judge Perris's opinion, 202 BR 149 (Bankr D Or 1997) (P96-23(10)), which held that (1) Bankruptcy Code § 330 does not authorize payment of compensation to Chapter 7 debtor's counsel and (2) a law firm that holds a valid attorney's retaining lien on a retainer it received prepetition may receive compensation for postpetition services from the security pursuant to Bankruptcy Code § 329, provided the fees are reasonable. The BAP agreed with Judge Perris's interpretation of ORS 87.430, that an attorney's retaining lien is effective upon the attorney's possession of the client's money or property, and that the lien can secure performance of an obligation in the future. The BAP also held that Bankruptcy Code § 545 provides a method for avoiding liens, but the avoidance power was not exercised in this case.

(SEE P99-10(10) - Ninth Circuit reversed BAP)

P97-18(10)

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# ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re ) BAP No. OR-96-2118-HNJ  
CENTURY CLEANING SERVICES, )  
INC., ) Bk. No. 395-36126-elp7  
Debtor. )

UNITED STATES TRUSTEE, )  
Appellant, )

v. )

GARVEY, SCHUBERT & BARER, and )  
MICHAEL B. BATLAN, Trustee, )  
Appellees. )

FILED

OCT 17 1997

NANCY B. DICKERSON, CLERK  
U.S. BKCY. APP. PANEL  
OF TH 9TH CIRCUIT

OPINION

Argued and Submitted on August 21, 1997  
at Portland, Oregon

Filed - October 17, 1997

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Before: HAGAN, NAUGLE<sup>1</sup>, and JONES, Bankruptcy Judges.

<sup>1</sup> Hon. David N. Naugle, Bankruptcy Judge for the  
Central District of California, sitting by designation.

1 HAGAN, Bankruptcy Judge:

2

3 The United States Trustee (UST) appeals an order of the  
4 bankruptcy court allowing compensation to the chapter 7  
5 Debtor's attorney, Garvey, Schubert & Barer. Because  
6 Garvey, Schubert & Barer held a valid lien on a retainer,  
7 that was not avoided, we AFFIRM the bankruptcy court's  
8 decision.

9

#### FACTUAL STATEMENT

10 On September 8, 1995, Century Cleaning Services  
11 ("Century") filed a petition for relief under chapter 11,  
12 Title 11, United States Code.<sup>2</sup> On the same date the  
13 Appellee law firm, Garvey, Schubert & Barer ("Garvey"),  
14 filed an application to be employed as counsel for Century  
15 as the debtor in possession. Richard Baroway, a member of  
16 the Garvey firm, filed an affidavit stating that Garvey had  
17 received a retainer of \$27,860.34 from Century.<sup>3</sup> On  
18 September 13, 1995, an order was entered allowing employment  
19 of Garvey as attorney for the debtor in possession.

20 The case was thereafter, on September 22, 1995,

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22 <sup>2</sup> Unless otherwise indicated, all references to  
23 "chapter" and "section" are to the Bankruptcy Code, 11  
24 U.S.C. §§ 101-1330, and all references to "rule" are to the  
Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.")  
1001-9036, which make applicable certain Federal Rules of  
Civil Procedure ("Fed.R.Civ.P.").

25 <sup>3</sup> On 9-7-95 Garvey had been paid \$5,216.86 by Century  
26 owner Kathy Tuttle and Victor King for services rendered  
27 from 12-6-94 to 6-30-95. Also on 9-7-95 Garvey was paid  
\$12,682.73 by Century as Debtor in Possession for services  
rendered between 7-26-95 and 9-6-95.

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1 converted to a case under chapter 7. Garvey submitted to  
2 the bankruptcy court, on behalf of the Debtor, the petition,  
3 schedules, the statement of affairs, and filed a Rule 2015  
4 report for the month of September 1995 and filed amended  
5 reports on behalf of Century thereafter.<sup>4</sup>

6 On June 10, 1996, Garvey filed an interim payment  
7 application for "Debtor's chapter 7 attorney's fees and  
8 expenses," for services from September 22, 1995 through  
9 April 30, 1996, in the amount of \$12,770.87. Garvey was  
10 seeking payment from Century's retainer for appearing at the  
11 Rule 2004 examination, preparation of the Rule 2015 reports  
12 and other miscellaneous services for Century. Garvey stated  
13 the fees were secured by an attorney's possessory lien  
14 pursuant to Oregon law.

15 On June 13, 1996, the chapter 7 Trustee (Trustee) filed  
16 a notice of intent to compensate Garvey, stating that no  
17 monies would be disbursed from the estate but that  
18 compensation to Garvey would be paid from Century's  
19 retainer. The UST filed an objection to this motion along  
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21 <sup>4</sup> Rule 2015(a) provides "[a] trustee or debtor in  
22 possession shall (1) in a chapter 7 liquidation case, and if  
23 the court directs, in a chapter 11 reorganization case file  
24 and transmit to the United States trustee a complete  
25 inventory of the property of the debtor within 30 days after  
26 qualifying as a trustee or debtor in possession." Fed. R.  
27 App. P. 2015(a). Century was debtor in possession for 16  
28 days pursuant to a petition for relief filed under chapter  
11. It appears that Garvey filed this report over a month  
later on behalf of Century for the 16 days while Century was  
in reorganization under chapter 11. Upon conversion to a  
chapter 7 case the report became the responsibility of the  
chapter 7 trustee.

1 with a notice of intent alleging the amendment of section  
2 330 pursuant to the Bankruptcy Reform Act of 1994 (1994 Act)  
3 and In re Fassinger, 191 B.R. 864 (Bankr. D. Or. 1996),  
4 prevented compensation to a chapter 7 debtor's attorney.  
5 The Trustee filed a response stating that the filing of the  
6 schedules and the Rule 2015 report were necessary to the  
7 estate, but objected to payment for other miscellaneous  
8 services. Garvey responded to the objections stating the  
9 firm had spent a substantial amount of time in preparation  
10 of conversion schedules, participation in the Rule 2004  
11 examination, and preparation of the Rule 2015 report and  
12 further alleged their efforts have been hampered by the  
13 demand of the Trustee for the turnover of all records.  
14 Further, Garvey alleged the work performed was done at the  
15 request of the court, the Trustee and the Debtor.

16 Following a hearing on August 27, 1996, in a written  
17 opinion, In re Century Cleaning Services, Inc., 202 B.R. 149  
18 (Bankr. D. Or. 1997) the bankruptcy court followed In re  
19 Fassinger and held that section 330 specifically authorizes  
20 payment to certain professionals but does not include  
21 chapter 7 debtor's counsel. Thus Garvey was not entitled to  
22 an award of compensation under section 330. The court,  
23 however, did conclude that Garvey held a valid attorney's  
24 retaining lien under Oregon law, but the compensation to  
25 Garvey was limited by section 329 and the fees must be  
26 reasonable. The court awarded Garvey \$10,568.37. The UST  
27 timely appealed.

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1 debtor's attorney.

2       The filing of a bankruptcy case creates an estate. 11  
3 U.S.C. § 541. The retainer from Century in Garvey's  
4 possession became property of the estate upon Century's  
5 filing a petition for relief. Section 330 provides for  
6 compensation from the bankruptcy estate to certain employed  
7 professionals.<sup>5</sup> Following amendment to the Bankruptcy Code  
8 under the Bankruptcy Reform Act of 1994, section 330(a) no  
9 longer provides for compensation to debtor's attorney.

10       Section 330 was further amended by the adoption of  
11 § 330(a)(4)(B) which authorizes the court to award  
12 reasonable compensation to the debtor's attorney  
13 "[i]n a chapter 12 or 13 case in which the debtor  
14 is an individual." (emphasis added). Those  
15 courts which have considered the matter have  
16 concluded that section 330(a) does not provide the  
17 basis for an award of attorney fees from estate  
18 funds to the debtor's attorney in a Chapter 7  
19 case.

16       In re Weibel, 176 B.R. 209 (9th Cir. BAP 1994), In re  
17 Fassinger, 191 B.R. 864, 865 (Bankr. D. Or. 1996); In re

18  
19       <sup>5</sup> Section 330 provides:

20       (a)(1) After notice to the parties in interest  
21 and the United States Trustee and a hearing, and  
22 subject to sections 326, 328, and 329, the court  
23 may award to a trustee, an examiner, a  
24 professional person employed under section 327 or  
25 1103 --

26       (A) reasonable compensation for actual,  
27 necessary services rendered by the trustee,  
28 examiner, professional person, or attorney and by  
any paraprofessional person employed by any such  
person; and

29       (B) reimbursement for actual, necessary  
expenses.

30       11 U.S.C. § 330(a)(1)(A) & (B).

1 Friedlund, 182 B.R. 576, 579 (Bankr. D. Colo. 1995); In re  
2 Kinnemore, 181 B.R. 520 (Bankr. D. Id. 1995).

3       Section 330(a) eliminates payment for the chapter 7  
4 debtor's attorney from the estate. "[I]t is incumbent  
5 for chapter 7 debtor's counsel to not rely on estate  
6 assets . . . to pay post-petition attorney's fees." In re  
7 Friedlund, 182 B.R. at 579.

8       Unlike other chapters of the Bankruptcy Code, the  
9 assets and interests of a Chapter 7 debtor and a  
Chapter 7 estate are not, essentially, the same.  
10 Further, the duties of a Chapter 7 debtor are  
limited to those set forth in Sections 343 and  
11 521, while debtors filing under other chapters  
must pursue confirmation of a plan of  
12 reorganization.

13 Id. (Citations omitted).

14       Thus Garvey was not entitled to compensation under 11  
15 U.S.C. § 330.

16       II. Compensation pursuant to attorney's lien under Oregon  
17 law.

18       The nature and extent of a security interest is  
19 determined by nonbankruptcy law, in this case, the law of  
20 the State of Oregon. Rosner v. Worchester (In re  
21 Worchester), 811 F.2d 1224, 1228 (9th Cir. 1987) (citing  
22 Butner v. United States, 440 U.S. 48, 54-55 (1979)). The  
23 filing of a petition for relief under Federal Bankruptcy law  
24 does not avoid a perfected security interest. Cardinal  
25 Enter. v. Far West Federal Bank (In re Cardinal Enter.), 68  
26 B.R. 460, 462 (9th Cir. BAP 1986); 11 U.S.C. § 548.

27       Garvey held an attorney's possessory lien under Oregon  
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1 Revised Statute (Or. Rev. Stat.) § 87.430 on the retainer  
2 from Century:

3 An attorney has a lien for compensation whether  
4 specially agreed upon or implied, upon all papers,  
5 personal property and money of the client in the  
6 possession of the attorney for services rendered  
7 to the client. The attorney may retain papers,  
8 personal property and money until the lien created  
9 by this section and the claim based thereon, is  
10 satisfied, and the attorney may apply the money  
11 retained to the satisfaction of the lien and  
12 claim.

13 Or.Rev.Stat. § 87.430 (1995).

14 The UST alleged Garvey could not possess a valid lien  
15 before its services earned the money paid in the retainer.  
16 The bankruptcy court, interpreting Oregon law, held the  
17 Oregon attorney's retaining lien is effective upon the  
18 attorney's possession of the client's money or other  
19 property, and allowed Garvey to receive compensation under  
20 that lien subject to the requirement that the fees requested  
21 be reasonable, stating:

22 I conclude that, similarly, under the Oregon  
23 statute a retaining lien is effective upon the  
24 attorney's possession of the client's money or  
25 other property. Because a lien can secure an  
26 obligation consisting of a contract for  
27 performance of an obligation in the future, it is  
28 not necessary that the services have been actually  
performed before the lien becomes effective.

29 In re Century Cleaning Services, Inc., 202 B.R. 149, 152-153  
30 (Bankr. D. Or. 1996) (citations omitted). We find no error  
31 in this interpretation.

32 Garvey held a valid lien on the funds in its  
33 possession. That lien was potentially avoidable pursuant to

1 a standing trustee's lien avoidance powers under the  
2 Bankruptcy Code. Section 545 provides that a trustee may  
3 avoid liens under various circumstances. Neither the  
4 standing trustee nor the UST attempted to avoid the lien  
5 under section 545. The bankruptcy court correctly stated  
6 that an attorney's retaining lien survives bankruptcy unless  
7 the trustee avoids the lien under the statutory lien  
8 avoidance powers. See In re Century Cleaning Services, 202  
9 B.R. at 153 (Bankr. D. Or. 1996) (citing Matter of Innkeepers  
10 of New Castle, Inc., 671 F.2d 221, 230 (7th Cir.), cert.  
11 denied, 459 U.S. 908 (1982)); see also Browy v. Gay, 527  
12 F.2d 799, 801 (7th Cir. 1976). Garvey's valid state law  
13 created lien could not be disregarded by the bankruptcy  
14 court solely on the basis the services performed were not  
15 authorized under section 330 of the Bankruptcy Code.

#### 16 CONCLUSION

17 While section 330 prevents payment to a chapter 7  
18 debtor's attorney for post-petition work from the estate,  
19 Garvey had a valid state lien on the retainer. The  
20 Bankruptcy Code provides that the procedure to circumvent  
21 the lien is to avoid the lien under section 545. That  
22 avoidance power was not exercised, the lien remains valid  
23 and the bankruptcy court properly concluded that Garvey may  
24 be paid under that lien. We AFFIRM.